No. 14985.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ADRIAN SCOTT,

Appellant,

vs.

RKO RADIO PICTURES, INC., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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Introductory Statement.

This is an appeal by Adrian Scott from a judgment for the defendant, RKO Radio Pictures, Inc., entered by the Court, sitting without a jury after it had found "in pursuance to the case of *Twentieth Century-Fox v. Lardner,* 216 F. 2d 844" that "the discharge of plaintiff by the defendant was made justifiably and upon and for good cause". The Court also found that the right to discharge was not waived or relinquished by defendant [R. 56].

The first trial of this case was held before a jury which found by a special verdict that appellant Scott did not by his conduct individually or in concert and agreement with others at and in connection with a hearing of the House Committee on Un-American Activities in October, 1947, violate any of the provisions of paragraph XVI of his employment contract [R. 37] and also returned a general verdict in his favor against the defendant [R. 38].

Following this verdict, the District Court granted defendant's motion for new trial on the ground that the verdict was contrary to the great weight of the evidence and that to permit the verdict to stand would be a miscarriage of justice [R. 46].

Thereafter, the parties stipulated that the second trial be submitted to the District Court sitting without a jury "upon the record[1] of the trial hereinbefore had herein", subject to the right of the parties to offer additional evidence [R. 47].

Statement of Jurisdiction.

1. The statutory provisions believed to sustain the jurisdiction of the District Court are U. S. C. Title 28, Sections 1332 and 1441.

2. The existence of the jurisdiction is shown by the following; (a) the allegation in the amended petition for removal of action to the United States District Court

> "that Adrian Scott, the said plaintiff, was at the time of the commencement of said suit and still is, a citizen of the State of California residing at Los Angeles in said state, and your petitioner RKO Radio Pictures, Inc., a corporation, defendant in said suit, was at the time of the commencement of said action and still is, a corporation created and existing under the laws of the State of Delaware, and was at the time of the commencement of said action and still is a citizen of said State of Delaware and not a resident or citizen of the State of California" [R. 13];

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[1]Wherever references are made to the record of the first trial, they will be referred to as "L. R."

(b) the allegation in the complaint that the defendant, RKO Pictures, Inc., is a corporation organized under the laws of Delaware which transacts business in the County of Los Angeles, State of California [R. 3]; (c) the prayer of the complaint that "wherefore plaintiff prays judgment against the defendants in the sum of $1,314,200.00" [R. 11, 12].

3. The statutory provisions believed to sustain the jurisdiction of the Court of Appeals are U. S. C. Title 28, Sections 1291 and 1294.

Statement of the Case.

1. The Pleadings and Issues.

1. In his complaint the plaintiff-appellant, Adrian Scott, alleged that the defendant-appellee, RKO Radio Pictures, Inc., a corporation, was engaged in the production of motion pictures for distribution and exhibition throughout the world; that plaintiff had acquired a national reputation for excellence of work in the motion picture industry and had won high public esteem throughout the world as an artist in the motion picture industry; that by written contract dated February 10, 1947, defendant employed plaintiff as a motion picture producer and director [R. 4].

The plaintiff alleged that he was discharged by defendants and that the defendants would not perform said contract [R. 7]. Among the other obligations of the plaintiff under the contract was the following [L. R. 116-117]:

> "XVI. At all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the Producer will conduct himself with due regard to the public conventions and

morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the Corporation or the motion picture industry in general; and he will not wilfully do any act which will tend to lessen his capacity fully to comply with this agreement, or which will injure him physically or mentally."

The prayer was for damages in the sum of $91,000.00[2] [R. 7].

2. The answer admitted the execution of the contract, but alleged that on November 26, 1947 plaintiff was in default under said contract and by reason of such default defendant discharged plaintiff from his employment thereunder [R. 18].

Defendant further alleged plaintiff had violated the morals clause (Par. XVI) of his contract and rendered himself unable to perform service contemplated and required by said contract.

Defendant prayed that plaintiff take nothing by reason of his complaint [R. 19-20].

In a supplemental answer defendant alleged that plaintiff had been in default under the contract in that, on October 30, 1947, before a committee of the House of Representatives he had wilfully and knowingly refused to answer questions propounded to him by said committee, thereby committing a crime, to wit; violation of Section 192 of Title 2 of the United States Code; and morals; that

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[2]The prayer is for damages in the sum of $1,314,200.00 but the striking of portions of the complaint had the effect of limiting the possible recovery to the damages above indicated.

plaintiff was convicted and sentenced to a term of imprisonment for one year which term plaintiff served.

The parties entered into a pre-trial stipulation [R. 21-33] which stated the text of the notice of discharge given plaintiff on November 26, 1947 [R. 23-25] and it was stipulated that on October 29, 1947 plaintiff appeared before the House Un-American Activities Committee and gave the testimony as reported in the hearings published by the United States Government Printing Office [L. R. 330-335] and Scott's offered statement [L. R. 382-386].

2. Plaintiff's Case.

At the first trial before a jury (the record of which was stipulated to be the record of the second trial before the Court sitting without jury), the first witness was the plaintiff-appellant Adrian Scott [L. R. 235]. He testified that in February, 1947 when his contract went into effect, Dore Schary was his immediate superior and was the one who gave him orders in connection with his work. Mr. Schary was Vice President of RKO Radio Pictures in charge of picture production [L. R. 236].

It was stipulated that Mr. Scott was qualified to perform his services as a writer and producer. On cross-examination, Mr. Scott said that he was subpoenaed to appear before the Committee on Un-American Activities hearings which began on October 20, 1947 [L. R. 237] and that the people who were subpoenaed with him were known as the nineteen unfriendly witnesses and that ten of them testified before the Committee [L. R. 240]. Mr. Scott stated that the witnesses had various meetings before going to Washington [L. R. 240]. He and Edward Dmytryk, another one of the witnesses, at first retained

Mr. Bartley Crum as their attorney and Mr. Crum afterwards associated other counsel [L. R. 241]. The nineteen pooled their resources for the purpose of employing counsel [L. R. 245].

Mr. Scott knew that a meeting had occurred at the Shoreham Hotel in Washington between his counsel and Mr. Eric Johnston of the Motion Picture Producers Association and that he had received a report on the meeting [L. R. 241]. Relative to defendant's Exhibit A, an advertisement published prior to the Committee hearings and entitled "An Open Letter to the Motion Picture Industry", Mr. Scott stated that it was signed by the nineteen men [L. R. 248]. Exhibit A is set forth at L. R. 249-253. Mr. Scott said he did and does approve of that statement [L. R. 254].

It was stipulated that Mr. Scott was one of a number of persons upon whose behalf a motion to quash was filed in the form of a telegraphic notice to the Chairman of the Committee [L. R. 256] and this notice was introduced by defendants' as Exhibit B [L. R. 258-259].

Mr. Scott said that he knew that each of the ten who had preceded him on the witness stand had refused to answer questions as to membership in the Communist Party and for such refusal had later been cited for contempt; that each of them had given statements to the press [L. R. 260-261]. Defendants' Exhibit C consisting of the testimony before the Committee of all ten men was received and read to the jury [L. R. 270-348]. Mr. Scott's testimony is to be found at L. R. 330 to 335. Exhibit D, the press release statements of all of the ten men, was next received in evidence at L. R. 351-392. [Mr. Scott's statement is to be found at L. R. 382-386. It was read to the jury at R. 92-97.]

The parties then stipulated that Mr. Paul McNutt had been specially employed to represent the Motion Pictures Producers Association in the Washington hearings [L. R. 393].

Public statements by Mr. McNutt, plaintiff's Exhibits 2 and 3, were received in evidence at L. R. 467-471. Plaintiff's Exhibit 2, Mr. McNutt said on October 22, 1947 that as a lawyer he would advise the industry to avoid concerted action to compile a blacklist of Communist writers, directors and other studio employees with the idea of denying employment to them. Such action, he asserted, was without warrant of law and was not in accord with an announced policy of Congress or rulings of the Supreme Court, and therefore, would involve the producers in serious legal difficulties. Hollywood films, he declared spoke for themselves and the American public was capable of judging them.

3. Defendants' Case.

Edward Dmytryk, defendant's first witness said he did not know which one of the nineteen actually prepared the "open letter" [Ex. A, L. R. 404] but that the practice of the group was to ask two or three of the writers to prepare material and then to discuss it before it was issued [L. R. 407].

Mr. Dmytryk said that the first meeting of the group was at Edward G. Robinson's house [L. R. 409] and the second meeting was at Louis Milestone's [L. R. 410]. Mr. Dmytryk was asked what attitude would be taken by the nineteen men when asked on the witness stand about Communist Party membership, and replied:

> "No one attitude or procedure was, to the best of my recollection, recommended over any other. I would say that the discussion was purely general" [L. R. 413].

"But we certainly never had any complete group discussion in which we definitely decided on an attitude for anyone of us or for the whole group of us before the Committee itself on the stand" [L. R. 419].

Mr. Dmytryk closed his direct testimony with the following statement:

"I just wanted to explain that the thing that brought this group of nineteen together was that they all thought that the Committee on Un-American Activities, as constituted at that time, was a bad committee, and that it should be fought; and as to how it should be fought we acted on our attorney's advice individually, * * * to the best of my knowledge at the time, and it was discussed by various groups, as I say, at one time or another, many times. The advice was that the best way to fight the committee was to somehow or other to get it into court, and the way to get it into court was in a way to defy it" [L. R. 422].

On cross-examination Mr. Dmytryk said that Senator Claude Pepper of Florida was present at the first meeting at the home of Edward G. Robinson. At that time Senator Pepper said that the Committee was held in no regard in Washington and by many people in this country [L. R. 423].

Talking motion pictures taken of all ten men while testifying before the Committee were then exhibited to the jury [L. R. 429] and received into evidence as Exhibit E [L. R. 431].

Eric Johnston, president of the Motion Picture Association of America, was then called to the stand [L. R. 432].

The court ruled that Mr. Johnston could testify as an expert to give his opinion on the reaction of the public to the conduct of the plaintiffs and the other eight men who testified [L. R. 434]. His conclusion was: "The public reaction, in my opinion, was unfavorable" [L. R. 450].

Mr. Johnston testified at length concerning his own observation of the public's attitude [L. R. 451-452], stating in part:

> "Because these men had been subpoenaed before a Congressional Committee and were asked whether they were or were not or ever had been members of the Communist Party, which they refused to answer, public opinion, in my opinion, was that they were members of the Communist Party, and that the industry was shielding and sheltering members who were members of the Communist Party, with all of the disrepute which that would bring to a great industry, which is extremely sensitive to public opinion" [R. 455].

On cross-examination, the witness admitted having made the following statement on November 19, 1947, at the Film Oldtimers dinner:

> "They may have had a right to challenge the committee as they did. I don't know. I am not prejudging. This is something to be tested in the courts. We need a determination on that score in the traditional American way and after that there can be no argument about" [L. R. 457; Ex. 10, p. 504].

Mr. Johnston also acknowledged his authorship of the full page advertisement, "The Citizen Before Congress" [Pltf. Ex. 5; L. R. 461], published October 27, 1947.

Mr. Johnston said that nothing had ever been brought to his attention subversive or un-American which had been produced by Mr. Scott [L. R. 466].

In making up his opinion as to public reaction, the witness said that he had considered Mr. McNutt's statement of October 22, 1947 [Pltf. Ex. 2; L. R. 467] in which Mr. McNutt had said that "as a lawyer he would advise the industry to avoid concerted action to compile a blacklist of Communist writers, directors and other studio employees with the idea of denying employment to them" because such action "was without warrant of law and would involve the producers in serious illegal difficulties" [L. R. 468].

Mr. Johnston said he had also taken into consideration an article written by Mrs. Eleanor Roosevelt, published in the Washington News on October 29, 1947, which was received as Plaintiffs' Exhibit 6 [L. R. 474], and contained the following language:

> "The picture of six officers ejecting a writer from the witness stand because he refused to say whether he was a Communist or not is pretty funny, and I think before long we are all going to see how hysterical and foolish we have become. * * * I have never liked the idea of an Un-American Activities Committee. I have always thought a strong democracy should stand by its fundamental beliefs and that a U. S. citizen should be considered innocent until he is proved guilty. * * * The Un-American Activities Committee seems to me to be better for a police state than for the U. S. A." [L. R. 474-476].

Mr. Johnston said that his own organization had compiled editorials relating to the Washington hearings [Pltf. Ex. 8]. The witness said that it represented a fair cross-section of newspaper opinions [L. R. 478].

Mr. Johnston said that George Gallup's Audience Research, Inc., is one of the services used to inform people in the entertainment field and that he took its report "Congressional Investigation of Communism in Hollywood—What the Public Thinks" into consideration in arriving at his opinion [L. R. 485]. This document was introduced as Plaintiffs' Exhibit 9 [L. R. 486], and it contained the following:

> "Surveys, made since the hearings terminated disclose that no increase occurred in the proportion thinking there are many Communists in Hollywood. It remains at 10%" [L. R. 488].
>
> "From the Standpoint of Box Office.
>
> "1. Findings from these studies indicate that the congressional investigation—at least that part of it which is now completed—will have little immediate effect on the box office.
>
> "The percentage of the public who thinks there are many Communists in Hollywood is not large. Only three per cent think the leaders in the industry favor Communism. The evidence points to the fact that the public has little awareness of possible Communistic influences, if any, in pictures being produced today. Also, few could name any particular player whom they thought of as a Communist or Communist sympathizer" [L. R. 491].

Mr. Johnston testified that there was a House Un-American Activities Committee meeting in executive session, held in Hollywood in June, 1947 [L. R. 493]. Following this meeting, Mr. Johnston said he had proposed a three-point program to the Producers' Association. The second point of this program provided for an agreement not to employ proven Communists in Hollywood

jobs where they would be in a position to influence the screen [L. R. 496]. The Association of Motion Picture Producers did not adopt the second point. Mr. Johnston had testified before the Committee: "They did not adopt that for several, and what they thought were very good, reasons" [L. R. 499]. These reasons were stated by him to be as follows:

> "The first reason assigned was that for us to join together to refuse to hire someone or some people would be a potential conspiracy, and our legal counsel advised against it.
>
> "Secondly, who was going to prove whether a man was a Communist or not? Was it going to be by due process of law in the traditional American manner, or was it to be arrogated to some committee in Hollywood to say he was a Communist, or some producer, and if they said he was a Communist they might at some future time find he was a Republican, a Democrat, or a Socialist, and not hire him. In other words, who is going to prove that this man was a Communist? And under what method?
>
> "Third, that it was the duty of Congress to determine two things: first, was a Communist an agent of a foreign government?—as I believe he is—and/or, second, is he attempting to overthrow our government by unconstitutional means? Therefore, it was up to Congress to make these two determinations before we could take action.
>
> "I must confess, they convinced me they were right on all three points, Mr. Chairman, and that is the reason they did not adopt No. 2."

At this point, counsel for defendant was permitted to read to the jury other excerpts from Mr. Johnston's testimony before the House Committee in October, 1947 [L. R. 517-522].

On further cross-examination, Mr. Johnston recalled making a speech December 5, 1947, at the Golden Slipper Square Club in Philadelphia in accepting an award for the making of "Crossfire" (a picture produced by Mr. Scott).

Mr. Walker, attorney for the defendants, then said:

> "We have no intention of trying to prove by evidence in this case that any pictures were more or less sucessful by reason of the conduct of these 10 men. We do claim, as I tried to say in my opening statement, that the motion picture industry and the particular employers involved here were prejudiced by the conduct of these men, but we intend to introduce no evidence to show or attempt to show that they were injured moneywise by the conduct of those 10 men—that is, by a direct falling off in boxoffice receipts" [L. R. 528].

Cross-examination was resumed and the witness said that he took into consideration the radio broadcasts of October 26 and November 2, 1947 [L. R. 529], and in particular he remembered the remarks on those broadcasts made by Senator Thomas of Utah, and Senator Kilgore of West Virginia. These were introduced as Plaintiffs' Exhibit 11, and contained the following language by Senator Thomas:

> "I label as unholy the methods adopted by the House Un-American Activities Committee in pursuing its course of trying to establish arbitrary values of Americanism" [L. R. 531].

On redirect, Mr. Johnston identified Exhibit "F" as a collection of photostated editorials [L. R. 540], which had been forwarded from his office [L. R. 536].

Portions of the deposition of N. Peter Rathvon, president of RKO, were then read to the jury [L. R. 563]. Mr. Rathvon told of a conversation with Mr. Scott after he returned from Washington in which he asked him to make a declaration of his political beliefs in order to correct a trend of public opinion. Mr. Rathvon said that he based his own view of the state of public opinion upon newspaper reading, Legion Post resolutions, and on material furnished him by the Motion Picture Producers Association [L. R. 564-567].

In the deposition Mr. Rathvon told of the alertness of his organization to changes in public opinion and the increasing tempo of unfavorable reaction in the Hearst papers [L. R. 571-590].

He said that the first meeting of the executive committee of RKO which considered the matter was around November 13 or 14, 1947 [L. R. 581].

Certified copies of the minutes of the RKO executive committee meeting of November 12th, 13th and 22nd were received in evidence. [L. R. 847].

Portions of the proceedings in the House of Representatives on November 24, 1947, were read to the jury, including a resolution certifying appellee to the District Attorney for contempt [L. R. 593], and the fact that it was adopted by a vote of 346 to 17 [L. R. 594].

A number of depositions of witnesses in various parts of the country (taken upon written interrogatories) and pertaining to public reaction were then offered in evidence by the defense as Exhibit "J" for identification, but the Court refused to admit them [L. R. 599], stating that the jury could be given an instruction that judicial notice could be taken of the unfavorable public reaction to Com-

munism. This instruction was ultimately given [L. R. 1101-1102; Deft. Instruction 15, L. R. 180].

The defendants then rested, subject to offering a collection of newspaper items [L. R. 599].

4. Plaintiff's Rebuttal.

Excerpts from Exhibit 8, the Producers' Association compilation of editorials, were read to the jury, including the Los Angeles Times, October 28, 1947, which said:

> "So far as the law is concerned, a Communist is simply a member of a political party, as a Democrat is, or a Republican. The feeling prevails that a private citizen has a right to entertain his political beliefs in private and this right is supported by the secrecy of the ballot" [L. R. 617].

Robert W. Kenny was then called as a witness for plaintiff [L. R. 625]. He testified that his office had subscribed to newspaper clippings on the hearings and had compiled them in Exhibit 13 [L. R. 973].

The witness related a meeting he and co-counsel had with Eric Johnston, Paul McNutt, and Maurice Benjamin, counsel for the producers, in Washington on October 19, 1947 [L. R. 627].

A copy of Exhibit "B", the motion to quash the subpoenas, was handed to Governor McNutt on this occasion and the contents of it were discussed [L. R. 628]. Additional copies of an accompanying memorandum of law [Ex. 21; L. R. 975-989] were sent up to the McNutt suite after the interview [L. R. 630].

Mr. Kenny said he said on that occasion that inasmuch as he and his associates were representing their employees he thought that they should know, as attorneys for the

employers, the moves that were going to be made and they discussed the motion to quash and the law. He said Mr. Benjamin said that some of the questions would only be settled by the Supreme Court [L. R. 631].

The witness stated Mr. McNutt said we are going to "make the same fight that Wendell Willkie made for the motion picture industry before the Nye Committee" [L. R. 631]. The meeting lasted an hour [L. R. 631].

Mr. Kenny said Eric Johnston told them that as long as he was president of the Producers Association there would be no blacklist [L. R. 632]; and that Bartley Crum said:

> "Eric, I knew that was true. I knew that you, Eric Johnston, would never support anything as un-American as a blacklist" [L. R. 632].

Upon cross-examination, the witness said that at the time of the Shoreham meeting he did not have any definite idea as to what the attitude of his clients would be if asked about Communist Party membership. This was because he had not been consulting with the individual clients [L. R. 636].

The witness said that he had told the group at the Shoreham meeting that if the motion to quash was denied the men would answer all pertinent questions of the Committee, but there was no discussion as to whether Communist Party membership would be pertinent [L. R. 637].

After the meeting at Mr. McNutt's apartments, the witness and the other lawyers reported to all of the 19 men what had happened [L. R. 641].

The Court then made the following statement to the jury:

> "Ladies and gentlemen, in order to save time, counsel have stipulated that the writings and the products

of the writings of the plaintiffs in this case continued to be exhibited throughout the United States, and that such exhibition of such pictures gave the plaintiffs their screen writer credit in pursuance to the terms of the contract, and the circulation was continued." [L. R. 643].

Dore Schary was next called by the plaintiff under Section 43(b) F. R. C. P. [L. R. 687]. During the year 1947 he was the executive vice president in charge of production at RKO and Adrian Scott was a producer working under his supervision and direction. In the year 1947, under his direction Mr. Scott worked on a picture entitled "Crossfire" and he did preparatory work on the pictures "The Boy With the Green Hair" and "The Great Man's Whiskers."

He was familiar with the fact that Mr. Scott had also worked for RKO on the pictures "Murder, My Sweet" and "Mr. Lucky." He never found anything in Mr. Scott's work for the motion picture screen which he would consider by any standards subversive or un-American. His work was very good and he was thoroughly satisfied with it [L. R. 688-689]. RKO worked with Audience Research, Inc., to determine the popularity of various people in the industry [L. R. 690].

Mr. Schary knew four or five weeks prior to the commencement of the un-American Activities Committee hearings in Washington between October 20 and 30, 1947, that Mr. Scott had been subpoenaed. Mr. Schary had also been subpoenaed himself [L. R. 691].

Before the openings of the hearings in Washington he recalled a discussion in which he stated to Adrian Scott that his job was safe and that the studio could not inquire into the political ideas of employees, that the

only matter was the ability and work of the employees and not their political associations [L. R. 691]. He remembered discussion with Scott the contents of a pamphlet in which he (Schary) had participated in preparing and which was leveled mainly at the personality and record of Representative Rankin and was not a general attack on the Committee. Mr. Schary said that in his conversation with Mr. Scott before the Committee hearings, the following took place:

> "We talked generally about the Committee and some of its procedures. I believe that some of its procedure was dangerous. We talked at one time about some of the individuals, particularly Mr. Rankin, whom I had objections to personally because of some of his bigoted points of view."

Mr. Schary said that he had read to Mr. Scott the statement which he was going to read before the Committee.

> "I had intentions of making a very strong statement myself." [L. R. 695].
>
> "I was going to make a statement attacking some of the techniques of the Committee. I changed my mind about making that statement when I was in Washington."

Mr. Schary stated that he did not feel compelled to tell Mr. Scott that he had changed his mind about making a statement [L. R. 695]. Mr. Schary did not remember that Scott ever told him that he was going to refuse to answer any of the questions of the Committee. At L. R. 699-670 the following interrogation took place:

> "Q. Now, Mr. Schary, don't you remember that the only thing you said to Mr. Scott was you wanted him to refrain from being loud and you

wanted him to refrain from being boisterous on the stand? A. That is right. * * *

Q. And you know, do you not, you heard Mr. Scott's testimony didn't you in Washington? A. Yes.

Q. He wasn't loud, was he? A. No.

Q. He wasn't boisterous, was he? A. No.

Q. You made some reference to what you could remember about your conversation with Mr. Scott—don't you recall that in your conversation with Mr. Scott, you told him that you were the one who had gotten a Hollywood trade paper before the hearing, to write the first article attacking the House Committee on Un-American Activities? A. Attacking the technique of the House Committee.

Q. Did you say to him 'attacking the technique of the House Committee'? A. The procedure, I am sure I did. I am sure I did not say 'attacking the House Committee.'

Q. Well, instead of talking to him about the procedures or telling him that you had gotten a trade paper to attack the procedures or the technique of the Committee, didn't you tell him that you had a paper, this trade paper, to challenge the charges of this Committee? A. The charge of the Committee that there was Communist Party propaganda in motion pictures."

The witness said that he remembered conversations with Mr. Scott after the hearings: "I said that I personally would still take the position that I took on the stand at Washington, and that I have taken that stand as a matter of fact at the Board of Directors meeting at RKO." [L. R. 703.] * * *

"Q. What was that? A. A man's employment had to be based on his ability to perform a service

rather than on any political affiliation. That was the position I had taken in Washington and that I still took at that time before the Waldorf meeting." [L. R. 704.]

"Q. Was there anything else said about what had been said by the Board of Directors and what the attitude of Mr. Rathvon was? A. That came later before I went to New York for that meeting. We tried to get both Scott and Dmytryk to sign affidavits which we thought might protect their positions with our Board of Directors, who were insisting that we get a non-Communist statement from Scott and Dmytryk." [L. R. 706.] * * *

"As I remember, both Scott and Dmytryk were willing to sign an affidavit that they were not in favor of any party that would overthrow the government by force but that they would not specifically say that they were or had not been Communists. Peter Rathvon would not accept that. He said that would not be acceptable and I told that to Scott." [L. R. 707.]

At L. R. 708 Mr. Schary testified:

"I told him (Scott) I didn't think the issue of challenging the Committee's right to ask you whether you were a member of a political party had been brought in properly.

I said this, and I said it to many people, that if there was an issue at stake, I thought the witnesses should have gone on the stand very quietly, and with respect to the Committee, that they didn't think the Committee had the right to ask such a question, and then leave the stand, call a meeting with the press, tell the press whether or not they were Communists, that they were not afraid to say that, but say the reason they had not answered the

question to find out whether or not there was a constitutional challenge in the act they had taken.

Q. This conversation with Scott took place after the hearings? A. That's right, sir."

Schary testified that he had only received about forty letters following the Committee hearings. The attitude of the writers of the letters toward Scott and Dmytryk was about half and half [L. R. 710]. A good many of the letters unfavorable to Mr. Scott came from lunatic branches or crackpots [L. R. 711].

Mr. Scott was recalled by the plaintiff to testify in rebuttal [R. 73]. He said that following receipt of his subpoena he had a conversation with Mr. Dmytryk and Mr. Schary in which Mr. Schary said that he wanted to make it clear that the studio was not interested in his politics. They were only interested in his work in the pictures he produced and in his ability as a maker of motion pictures for RKO [R. 74]. Mr. Schary had said that this was Mr. Rathvon's position and that this was also the studio's position and that the industry was going to be behind him (Scott).

"Mr. Schary said that the industry was opposed to this investigation and they felt it was an attack on the screen freedom and that the industry intended to stand up and fight against this Committee. * * * He said nothing about techniques or procedures to me. I recall very clearly Mr. Schary reading a typewritten statement to me in which he said he was going to read to the Committee when he appeared in Washington." [R. 75.] * * *

"Mr. Schary spoke about a pamphlet which he had compiled on the subject of Representative John Rankin who was a member of the Un-American

Activities Committee. This pamphlet, which I had not seen, Mr. Schary told me dealt with Mr. Rankin's anti-Semitic and anti-Negro and anti-United Nations activities. Mr. Schary was apprehensive lest this subject would be brought up or he would be confronted with this pamphlet while he was testifying in Washington." [R. 76.]

"Mr. Schary had received a visit from two investigators of the Committee—Leckie and Smith—and Mr. Schary said that they had requested the setting up for viewing of two films that RKO Pictures had made. Mr. Schary said they wanted to see a film which he made which was called 'The Farmer's Daughter,' which was then under attack, and they also wanted to see a film which I had made called 'Crossfire'." [R. 77.]

"In substance Mr. Schary said this was an attack on progressive film-making." [R. 77.]

"Mr. Schary made one request only, and that request was that we, Mr. Dmytryk and myself, that we conduct ourselves in a mannerly fashion before the Committee and that was the only thing that he said." [R. 78.]

After the hearings were over in Washington, Mr. Scott said he had a conversation with Mr. Schary:

"Mr. Schary also said in regard to the hearings that he was very upset about the sell-out of Jack Warner, the head of Warner Brothers Studio, that he resented that, and he resented the sell-out of the industry, that he alone took the position that they had all agreed they would take in Washington. * * * That they were to stand up and to fight against the Committee. He thanked me for conducting myself in a mannerly fashion before the Committee, and

he said that he personally resented being made the 'patsy' of the hearing, which was his own word.

Following his return from Washington Mr. Scott said he continued to work every day in the studio until the time he was fired." [R. 82.]

"I asked Mr. Schary about the question of jobs, jobs of everybody, because of the hearings, and he said that he thought that a blacklist would be set up, that it would be an unannounced blacklist, and that men now would be hired or not hired because of what went on in Washington, and he thought this was pretty terrible, and that he would continue to hire men because of their ability, and not because of what somebody thought of their politics." [R. 83.]

On the occasion of the discharge Mr. Scott was in Peter Rathvon's office at RKO:

"Mr. Rathvon first handed us * * * a letter which stated that if we went on voluntary suspension, that if we were acquitted in the courts, and that if we signed an affidavit that we were not and never had been members of the Communist Party, that we then could resume our contracts at the point at which these facts were determined."

When they refused to sign this letter, Rathvon then gave him the letter of discharge and a man from the Accounting Department gave them their final checks [R. 85-86.]

On cross-examination Mr. Scott said that he had not told Mr. Schary at any time before he left for Washington that he would refuse to answer questions asked by the Committee.

"I didn't know at that point what my testimony would be."

He said he did not reach a decision on his testimony until he reached Washington [R. 98].

5. Defendants' Surrebuttal.

By stipulation, defense counsel was permitted to read to the jury Eric Johnston's version of the meeting in Paul McNutt's apartment on the evening of October 19, 1947, as given by him in the trial of *Cole v. Loew's* [L. R. 759-766].

Mr. Ring Lardner was recalled as a witness by the defendant under Rule 43(b) [L. R 876], and testified that he attended the meeting at the home of Edward G. Robinson and 150 or more people were present [L. R. 876]. There was one meeting at the home of Mr. Milestone attended by substantially all of the unfriendly 19 witnesses at which the pooling of legal expenses and employment of counsel was discussed [L. R. 877].

On cross-examination the witness stated that the persons present at the Robinson meeting included several motion picture actors, Mr. and Mrs. Humphrey Bogart, Danny Kaye, and Mrs. Robinson, who introduced Senator Pepper [L. R. 881].

> "The Witness: As I recall, Senator Pepper told us that whereas the historical role of congressional committees gave them quite extensive powers, that there was something much higher in the Constitution than that, and that, since the Congress was unable to legislate at all under the First Amendment in the field of free speech, that it was not proper for them to investigate in that field, since the only purpose of a congressional investigation was to prepare legislation.
>
> "He felt that motion pictures clearly came under the general heading of freedom of the press, and any

> such investigation into the content of motion pictures was none of Congress' business under the First Amendment, and that the politics of anybody who worked in motion pictures were similarly none of Congress' business, and that, therefore, the committee was functioning outside its proper sphere and was not conducting a legal investigation." [L. R. 883].

On redirect, Mr. Lardner said that Senator Pepper discussed the right of Congress to investigate Communism and said that

> "there was a certain narrow area within which this sort of committee might function—I think he confined what he said almost entirely to the field of the motion picture. As I recall it he confined it to motion pictures and Congress' right to investigate in that area." [L. R. 884.]

Eric Johnston's testimony on October 27, 1947, before the House Committee was then read to the jury [L. R. 891-949].

Defense cousel then read to the jury editorials selected from Exhibit "L."

Following this plaintiff's counsel read other editorials from the same exhibits.

Plaintiff's Exhibit 21, the memorandum in support of motion to quash subpoenas [Ex. "B"; L. R. 975], and Exhibit 7, an article by Harold L. Ickes in New York Post, October 31, 1947, were received in evidence [L. R. 990]. Both sides then rested.

6. The Verdict.

At the conclusion of the first trial the jury rendered a special verdict that the plaintiff, Adrian Scott, had not by his conduct individually or in concert and agreement with others at and in connection with the hearing of the House Committee on Un-American Activities in October, 1947, violated any of the provisions of paragraph XVI of his employment contract. By a second special verdict they found that the defendant, RKO Radio Pictures, had not intentionally waived any right it might have had to discharge the plaintiff Adrian Scott from his employment. In addition the jury rendered a general verdict in favor of the plaintiff Adrian Scott against the defendant [L. R. 37-38].

Defendant's motion for a new trial was granted following said verdicts upon the two grounds that the verdict was contrary to the great weight of the evidence and that to permit the verdict to stand would be a miscarriage of justice [R. 46].

7. The Second Trial.

The case was not retried until this Court rendered its decision in *Twentieth Century-Fox Film Corporation v. Ring Lardner, Jr.,* No. 13,491, 216 F. 2d 844 [R. 141]. Upon a stipulation of the parties [R. 47] the case was retried without a jury before the same District Judge who had heard the case originally when sitting with a jury [R. 47]. The proceedings on retrial were very brief and are to be found at R. 127-143.

Plaintiff offered the entire record and exhibits that were offered in the original trial of the action [R. 127] and then rested [R. 128]. The defendants offered Section M of the pre-trial stipulation concerning the pro-

ceedings leading up to and including the indictment and conviction of the plaintiff Adrian Scott on the charge of violating Section 192 of Title 2. of U. S. C. Plaintiff objected to the receipt in evidence of these facts on the ground the events had occurred after notice of discharge were given to the plaintiff. However, the Court admitted the items on the basis of this Court's ruling in *Twentieth Century-Fox v. Lardner*, 216 F. 2d 844, saying [R. 129-130]:

> "The Court: Gentlemen, so we may understand each other thoroughly, the Court feels that it is bound by the decision of the Ninth Circuit in the Lardner case, so the only question that this Court has before it is the question of waiver. I feel that would be my limitation. I would be bound to follow the Court's holding to the effect that he (the plaintiff) had violated the contract * * * as a matter of law under the Ninth Circuit's decision."

Defendants additionally offered into evidence those portions of the Rathvon deposition which were, on objection, excluded at the first trial but which were copied into the record as an offer of proof and are to be found in the record on this appeal at R. 60 to R. 73 and R. 135 to R. 136. The defendants stated that this evidence had to do with waiver [R. 134]. The defendants then rested [R. 140], and the Court then made the following statement [R. 141-142]:

> "There is only one thing that I can do and that is grant the defendants judgment based upon the reasoning of— * * * the Lardner case.
>
> One reason I granted a new trial in the Scott case was because they didn't find there was a waiver and there has been nothing offered here that indi-

cates any change of evidence insofar as waiver is concerned.

Your question is whether or not a man conducting himself as Scott apparently did, under the guidance of Mr. Kenny, conducted himself before a Senatorial committee as he did and his subsequent conviction involves the question of moral turpitude. As a matter of fact his conviction was grounds for termination of the contract. Of course the contract expired before that conviction.

Mr. Kenny: Yes, that is right. And of course our point and we are not pressing it now, under the Quinn case Scott could not have been convicted because the Quinn case held that a witness is entitled to a—

The Court: I have sent a lot of men to jail who shouldn't have been imprisoned.

We are living in a time of change, not only insofar as the law is concerned, but changes in everything.

As I say, I have sent many a Jehovah Witness to jail who under the present ruling of the Supreme Court should not have been committed.

But that is a matter that has to be decided by the Supreme Court and I am controlled by the Ninth Circuit, so I am going to direct counsel for the defendants to prepare findings in accordance with the court's ruling."

Said findings of fact and conclusions of law were subsequently signed by the Court [R. 49] and a judgment in favor of the defendant was entered [R. 57]. Notice of Appeal was timely given [R. 58].

ARGUMENT.

Preliminary.

The critical question on this appeal is whether Scott's conduct, as a *matter of law,* constituted a breach of the morals clause of his contract. For the convenience of the court that clause is quoted below:

> "16. At all times commencing on the date hereof and continuing throughout the production and distribution of the Pictures, the Producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not wilfully do any act which will tend to lessen his capacity fully to comply with this agreement, or which will injure him physically or mentally."

The jury, by special interrogatory, found that Scott had not violated his contract.

There was no conflict in the evidence concerning what Scott did and no conflict concerning the surrounding circumstances. It is true that press reports and the opinions of commentators varied, but none of these opinions tended to alter the actual facts.

The trial court gave judgment for respondent on the theory that this case was controlled by *Twentieth Century v. Lardner,* 216 F. 2d 844 (C. A. 9, 1954). In that decision the Court of Appeals determined as a matter of law, and contrary to the jury's verdict, that Lardner's employer "just necessarily suffered a net loss in prestige,"

and went on to hold that Lardner's conduct constituted moral turpitude "as a matter of law." 216 F. 2d 844, 851.

Appellant contends that in the present case the issue was one of *fact,* not law. Because there was no conflict in the evidence, the verdict of the jury should have been allowed to stand.

I.

The Jury's Determination That Scott Had Not Violated His Contract Was a Determination of Fact, and the Trial Court Had No Power to Set Aside the Verdict.

It may be sufficient to say that the foregoing principle was recognized below when both parties submitted the question to the jury for a finding on a special interrogatory [R. 37].

An analysis of the facts and decisions substantiates the foregoing.

It has already been noted that there was no conflict in the evidence concerning what Scott did. In *Lardner,* which was tried simultaneously with this case, this court said: "There being no dispute as to what the ten men did . . ." (216 F. 2d 850, 851.)

The morals clause was concerned mainly, if not wholly, with the effect of the employee's conduct. By that clause the employee agreed:

(1) To conduct himself with due regard to the public conventions and morals.

(2) Not to do anything which would tend to degrade him in society; or

(3) Bring him into public disrepute, contempt, scorn, or ridicule; or

(4) Tend to shock, insult or offend the community or public morals or decency; or

(5) Would prejudice his employer or the motion picture industry in general.

Items 1, 2, 3 and 4 are concerned with the community's sense of propriety, public morals, and the community's sense of right conduct. No statute, decree, executive order, or other source of law dictates any of the foregoing; on the contrary, they draw peculiarly from an inchoate community feeling, not susceptible to legislative definition or judicial decree.

It is equally true that the question of prejudice to an employer is a question of fact. No question of law was presented when a jury, having all of the evidence, concluded that Scott's employer was not prejudiced.

A. Differences Between Lardner's Contract and Scott's Contract.

A principal item in Lardner's contract was a provision that the employee's *commission of an offens*e involving *moral turpitude* committed a breach; the *Lardner* opinion dealt at length with this phrase in concluding that Lardner's conduct constituted moral turpitude as a matter of law. The Scott contract does not refer to an *offense* or to *moral turpitude.*

It is true that public morals and moral turpitude are related items, one depending upon the other, the two differing primarily in degree.

In *In re Hatch,* 10 Cal. 2d 147 (1937), it was said, at page 151:

> "The concept of moral turpitude depends upon the state of public morals, and may vary according

> to the community or the times. (*In re Bartos,* 13 F. 2d 138.) In *Beck v. Stitzel,* 21 Pac. 522, 524, citing among other cases, *In re Coffey* [123 Cal. 522], it was said: 'This element of moral turpitude is necessarily adaptive; for it is defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community.' "

In *In re Bartos,* 13 F. 2d 138 (Neb., 1926), it was said at page 139:

> "The concept of moral turpitude depends upon the state of public morals, and may vary according to the community or the times. (Citations.)"

The distinction which is relevant to the present appeal is that while the determination of whether certain conduct constitutes an "offense involving moral turpitude" has in some cases been thought to present a question of law, this is not true, so far as we have been able to discover, of questions involving public morals and decency.

The decision is *State v. Malusky,* 59 No. Dak. 501, 230 N. W. 735, 71 A. L. R. 190 (1930), contains an illuminating discussion on the subject of *public morals* at page 193:

> "Some standards must exist according to which the determination as to whether act or conduct is moral or immoral is to be made. That standard is public sentiment—the expression of the public conscience. It may be manifest, unwritten, and more or less nebulous, as legend, as tradition, as opinion, as custom, and finally crystallized, written as the law. Thus the standard is fixed by the consensus of opinion, the judgment of the majority. When the

majority is slight, there is, of course, greater opposition to the part of the minority to the standard. The majority may become the minority and the standard change. But, so long as it is established, measurement must be made according to its terms."

In decisions dealing with related problems, such as proof of good moral character and questions of obscenity, it is uniformly held that such questions are questions of fact. The essence of the problem is the consistency or lack of consistency of given conduct with the community's sense of morality and propriety. It is not fitting that a judge or a court should impose his personal standards as the touchstone for determining such questions.

B. A Question of Fact.

The following is from the opinion in *Johnson v. U. S.*, 186 F. 2d 588 at 589-590 (C. A. 2, 1951), a case involving an alien naturalization.

". . . We must own that the statute imposes upon courts a task impossible of assured execution; people differ as much about moral conduct as they do about beauty. There is not the slightest doubt that to many thousands of our citizens nothing will excuse any sexual irregularity, for some indeed this extends even to the subsequent marriage of an innocent divorced spouse. On the other hand there are many thousands who look with a complaisant eye upon putting an easy end to one union and taking on another. Our duty in such cases, as we understand it, is to divine what the 'common conscience' prevalent at the time demands; and it is impossible in practice to ascertain what in a given instance it does demand. We should have no warrant for assuming that it

meant the judgment on some ethical elite, even if any criterion were available to select them. Nor is it possible to make use of general principles, for almost every moral situation is unique; and no one could be sure how far the distinguishing features of each case would be morally relevant to one person and not to another. Theoretically, perhaps we might take as the test whether those who would approve the specific conduct would outnumber those who would disapprove; but it would be fantastically absurd to try to apply it. So it seems to us that we are confined to the best guess we can make of how such a poll would result."

In *United States v. Francioso,* 164 F. 2d 163 (C. A. 2, 1947), the court said:

"In United States *ex rel. Iorio v. Day* (2 Cir., 34 F. 2d 920, 921), in speaking of crimes involving 'moral turpitude' we held that the standard was, not what we personally might set, but 'the commonly accepted mores': *i. e.,* the generally accepted moral conventions current at the time, so far as we could ascertain them. The majority opinion in United States *ex rel.* Berlandi v. Reimer (2 Cir., 113 F. 2d 429) perhaps looked a little askance at that decision; but it did not overrule it, and we think that the same test applies to the statutory standard of 'good moral character' in the naturalization statute. Would the moral feelings, now prevalent generally in this country, be outraged because Francioso continued to live with his wife and four children between 1938 and 1943? . . ."

Similarly see *United States v. Reimer,* 113 F. 2d 429 (C. A. 2, 1940); *United States v. Day,* 34 F. 2d 920 (C. A. 2, 1929); *In re Matura,* 87 Fed. Supp. 429 (S. D. N. Y., 1949).

In *Knoles v. U. S.,* 170 Fed. 409 (C. A. 8, 1909), it was held that a court cannot in an obscenity prosecution, declare a writing to be obscene as a matter of law. See also *Magon v. U. S.,* 248 Fed. 201 (C. A. 9, 1918); *United States v. Kennerly,* 209 Fed. 119 (S. D. N. Y., 1913). In the last cited case it was said:

> ". . . If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.
>
> * * * * * * * *
>
> "Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of *general notions about what is decent.* A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech" (p. 121).

To the same effect is *United States v. Levine,* 83 F. 2d 156 (C. A. 2, 1936).

It is submitted that the trial court therefore was in error in concluding that the decision in the *Lardner* case on a question of law was binding on it in making a finding of fact.

C. Scott's Conduct Was Not a Violation of His Morals Clause.

During the past few years, and since this Court's ruling in the *Lardner* case, decisions of the Supreme Court of the United States in the area of Congressional inquiry have tended to clear the atmosphere.

Mr. Scott's conduct would not today be thought to constitute an offense. He was not at any time specifically directed to answer the questions propounded to him [R. 331-335]; and the Supreme Court has held that such a specific direction is a prerequisite to a conviction for contempt. (*Quinn v. U. S.,* 349 U. S. 155 (1955); *Fagenbaugh v. U. S.,* 232 F. 2d 803 (C. A. 9, 1956).)

Furthermore, the Supreme Court has recently held that no implication whatever may be drawn from the failure of a witness to answer in a Congressional inquiry. In *Slochower v. Board of Ed.,* 100 L. Ed. (Adv. p. 449) the court on April 9, 1956, said at page 454:

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown v. Walker,* 161 U. S. 591, 610, 40 L. Ed. 819, 825, 16 S. Ct. 644. We have reaffirmed our faith in this principle recently in *Quinn v. United States,*

349 U. S. 155, 99 L. Ed. 964, 75 S. Ct. 668. In *Ullman v. United States,* ..... U. S. ....., 100 L. Ed. (Advance p. 361), 76 S. Ct. ....., decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in Ullman, a witness may have a reasonable fear of prosecution yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See Griswold, The Fifth Amendment Today (1955)."

In view of the foregoing language, no United States court would today draw any incriminating conclusions from Scott's failure to answer.

It should be noted that Slochower relied on the Fifth Amendment, which in terms deals with incrimination; Scott, on the contrary, relied on the First Amendment.[3]

Clearly no sinister motive or contemptuous attitude can be imputed to a reliance on the First Amendment, or to an attempt to determine, by judicial means, the power of Congress to conduct such an inquiry.

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[3]"Mr. Scott: I do not believe it is proper for this Committee to inquire into my personal relationships, my private relationships, my public relationships." [L. R. 332; Deft. Ex. B, particularly at par. FOURTH; L. R. 259.]

II.

The Order Granting a New Trial Was Based Upon an Error of Law and Should Be Reversed.

While an order granting a new trial is not an appealable order, it is of course reviewable on appeal from a final judgment. (*Marshall's U. S. Auto v. Cashman,* 111 F. 2d 140 (C. A. 10, 1940); *Kanatser v. Chrysler Corp.,* 195 F. 2d 104 (C. A. 10, 1952).)

The function of the trial court on a motion for new trial, even in the case of conflicting evidence, does not include the substitution of the court's determination of what is reasonable, or of what is proper. A good discussion and review of pertinent authorities appears in *Moore v. Rose-Cliff Realty Corp.,* 88 Fed. Supp. 956 (D. N. J., 1950), in which it was said:

> "The courts 'are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' "
>
> * * * * * * * *
>
> [The court then quotes from *Tennant v. Peoria etc. Ry. Co.,* 321 U. S. at p. 35, as follows]:
>
> " 'The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' "

Going on, it was said:

> "It was held by the Supreme Court in the case of *Lavender v. Kurn, supra,* 327 U. S. at page 652, 66 S. Ct. at page 744, that 'it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury.' It necessarily follows that it would likewise be an undue invasion of the jury's historic function for the trial court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury."

The foregoing language is particularly appropriate in the present case, in which there was no conflict as to the facts and the question for the jury was whether Scott's conduct violated any public standards of morals or decency.

While it is of course true that the Court of Appeals will generally not reverse a trial court's order on a motion for new trial, it is also true that "in the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in any similar situations . . ." (*Charles v. Norfolk & Western Ry. Co.,* 188 Fed. 691, at 692 (C. A. 7, 1951), citing *Kotteakos v. U. S.,* 328 U. S. 750.) A reviewing court should not hesitate to set aside an order on motion for a new trial where the trial court erred on a question of law.

> "It is ordinarily said that the granting of a new trial is within the sound discretion of the trial court, and it is sometimes loosely said that the action of the court in this respect is not reviewable. It is

> true also that appellate courts will not ordinarily review the action of a trial court in refusing a motion for a new trial on questions of fact. . . . And when the question on which the motion for a new trial is based is a question of law, the action of the trial court is undoubtedly subject to review."
>
> *Prichard v. Nelson,* 55 Fed. Supp. 506, 516 (W. D. Va., 1942).

It is also true that a court's order on motion for new trial will be reviewed where it appears the order was based on an erroneous reason or mistake. (*Sommerville v. Capital Transit Co.,* 192 F. 2d 413 (C. A. D. C., 1951); *Natl. Beneficial Life v. Shaw-Walker Co.,* 111 F. 2d 497 (C. A. D. C., 1940); *cf. Southern Pacific Co. v. Guthrie,* 186 F. 2d 926 at p. 932 (C. A. 9., 1951).)

It is submitted that the trial court's order granting a new trial and setting aside the jury's verdict was based on error in law; the order should be set aside, and the judgment in favor of plaintiff should be reinstated.

III.

The Trial Court's "Finding" That Scott Had Violated His Contract Was Not a Finding of Fact, and in Any Event Is Erroneous.

The record discloses that the trial court did not purport to exercise any independent determination in the finding which states that the plaintiff violated the morals clause of his contract. When the case was on retrial, on the record made in the previous trial, Judge Harrison said:

> "The Court: Gentlemen, so we may understand each other thoroughly, the Court feels that it is bound by the decision of the Ninth Circuit in the Lardner case, so the only question that this Court

has before it is the question of waiver. I feel that would be my limitation. I would be bound to follow the Court's holding to the effect that he had violated the contract.

Mr. Kenny: As a matter of law?

The Court: As a matter of law under the Ninth Circuit's decision."

This explicit statement is reflected in the language of Finding XI [R. 54-55], which states:

"In pursuance to the case of 20th Century Fox v. Lardner, 216 F. 2d 844, the Court finds that: etc."

It is apparent that the trial court felt itself bound by the opinion rendered in *Lardner,* and made it plain that the trial court was not attempting to reach an independent conclusion on the record.

While it is true the facts were not disputed, it is also true that the standards imposed by the Scott contract were different from those imposed by the Lardner contract. This point is discussed more fully under the heading "Differences Between Lardner Contract and Scott Contract." (I, A, this brief.)

What has been said heretofore on the point that the question of breach was a question of fact, not of law, is pertinent here. It was, of course, the duty of the trial court, in making a finding of fact, to exercise an independent determination on the record; and in making a finding of fact, a trial court is not bound by a determination made in another case as a matter of law.

In any event, as has been argued under Point I hereof, the determination that Scott had violated his contract was erroneous.

The argument which underlies appellant's contention under the present heading is that the jury properly determined the facts, and there was no basis in law for setting the original verdict aside.

Conclusion.

The judgment should be reversed and the trial court directed to enter judgment in accordance with the verdict of the jury.

Respectfully submitted,

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